

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Thomas S. Hixson, Magistrate Judge
4
5 EPIC GAMES, INC.,)
6 Plaintiff,)
7 vs.) Case No. C 20-05640-YGR
8 APPLE, INC.,)
9 Defendant.)

10
11 San Francisco, California
12 Thursday, December 5, 2024

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
14 RECORDING 1:17 - 1:39 = 22 MINUTES

15 APPEARANCES:

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1 Thursday, December 5, 2024

1:17 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE COURT: Good afternoon. We are here in Civil
5 Action 20-CV-5640, Epic Games v. Apple.

6 Let's have counsel state their appearances, starting
7 with Plaintiff.

8 MR. EVEN (via Zoom): Yonatan Even of Cravath for
9 Epic Games.

10 MR. PERRY (via Zoom): Mark Perry, your Honor,
11 from Weil for Apple.

12 THE COURT: Good afternoon.

13 We are here as a follow-up to the December 3rd hearing
14 to discuss ways to address the large numbers of documents
15 over which Apple has claimed privilege. And I asked the
16 parties to meet and confer about potentially using our
17 special master, or maybe even more than one special master.

18 Let me first turn to Epic. Can you please provide me
19 with a status update?

20 MR. EVEN: Absolutely, your Honor. Thank you.
21 So, we have met and conferred with Apple twice. And we
22 proposed a plan going forward to Apple last night. Then we
23 think we have confirmation on most of it at least from Apple
24 as to their agreement as of this afternoon. And so if your
25 Honor would allow me, I will go through the plan, and then

1 Mr. Perry, if he has any comments to that, I'm sure he can
2 chime in.

3 THE COURT: Please go ahead.

4 MR. EVEN: So, the plan is for Apple to re-review
5 all its privilege calls in light of your Honor's order and
6 apply the standards that are laid out therein. Apple will
7 do so at a reasonable clip. We have proposed 20,000
8 documents per week. And Apple is, I think, generally
9 amenable, but will get back to us with a final answer on
10 that.

11 At the end of each week Apple will produce to Epic,
12 subject to one caveat, as I'll speak to at the end, all the
13 documents over which Apple is no longer claiming privilege.
14 Any document over which Apple stills claims privilege will
15 be produced for in-camera review by a panel of three special
16 masters who will be compensated jointly by the parties.

17 The special masters will rule on these privilege claims
18 and those rulings would be binding, subject only to a right
19 to appeal to your Honor under the applicable rules. The
20 special masters will promptly inform the parties and the
21 Court should any of them conclude that Apple's privilege
22 calls upon re-review are inconsistent with the guidelines
23 that were issued by your Honor.

24 Should Apple stand on a large number of privilege calls
25 that would overwhelm the process I just laid out and be too

1 many for the special masters to go through without deviating
2 from your Honor's guidelines, just because there are a lot
3 of documents at stake, then we will meet and confer with
4 Apple and the possibility of expanding the panel to ensure
5 that there's a speedy resolution of this issue, potentially
6 by adding additional special masters.

7 So that's the general plan, and there a couple of three
8 or four open items, your Honor, that I would like to go
9 through, if I may.

10 THE COURT: Yes, please.

11 MR. EVEN: So one is, I think Apple would -- has
12 suggested, and I think that's something that we would agree
13 to, that we will provide a written protocol for this process
14 to your Honor. We've discussed it. We'd like to do so
15 promptly. I think Epic at least would propose that it will
16 be done by Tuesday at maybe 5:00 p.m. Pacific, so we don't
17 get into very late-night filings, but that seems a doable
18 goal.

19 The question of what happens should Apple decide to
20 appeal your Honor's order. So, Epic is of the view that the
21 process should not be stayed. And then we have a couple of
22 options. One option is that the process would continue just
23 as I laid out before, and Apple would produce the documents
24 but reserve the right to claw them back if it prevails on
25 the appeal.

1 The other option is that the process will proceed as I
2 laid out in all material terms, meaning Apple's re-review
3 and the special master's review. The documents will not be
4 produced to Epic, downgraded documents will not be produced
5 to Epic until the appeal is resolved. That is obviously
6 something that will create at least some delay in our
7 ability to prepare for the continuation of the hearings.
8 But I understand from your Honor's order last time that we
9 did not at least get the 11 documents before Apple decides
10 what to do on appeal and the appeal is resolved.

11 On the appointment of the special master, I think
12 Epic's view is that the process on the Court's side, we
13 understand from your Honor last time, that this is something
14 that should go to Judge Gonzalez Rogers. If so, then we
15 think that that process should begin today. And I think
16 Apple is in agreement with that, but I will let them comment
17 on that so that we can get the panel up and running as soon
18 as possible.

19 We previously used Elizabeth Laporte as a special
20 master in this case, and I think both parties had a good
21 experience with her and would be willing to use her here. I
22 have tried to get a call with Ms. Laporte between our meet
23 and confer today and this hearing, and last I heard is I've
24 been told she has agreed to meet with us on Saturday
25 morning, because he's busy today and tomorrow and early next

1 week. So I'm not sure she's a -- she will be a good
2 candidate, but the parties I think will want to speak to
3 her.

4 I have also proposed to Apple a few other names, and I
5 know your Honor proposed that maybe your Honor had some --
6 has some ideas about potential special masters, and I'm sure
7 that will be appreciated by both parties.

8 So I think that is more or less where we are on status
9 as far as Epic is concerned, your Honor.

10 THE COURT: Thank you.

11 Let me turn to Apple for your status update.

12 MR. PERRY: Thank you, your Honor. I largely
13 agree with Mr. Even with just a couple of amendments. One
14 is, we have -- Apple does agree at Epic's request to re-
15 review the 57,000 or so withheld or redacted as privileged.
16 We have agreed to submit them, either to Epic or to a
17 special master.

18 We've also offered, subject to a non-waiver agreement,
19 to provide an enhanced sort of privilege log to get Epic
20 some more of the information that it has been requesting
21 regarding the documents withheld as privileged.

22 Some of the more detailed issues that Mr. Even raised,
23 such as the number of documents per week we believe need to
24 be addressed in the first instance with the special master,
25 because I think the recipient end is an important part of

1 the equation here. And that is -- we are in agreement that
2 we should, if approved by the Court, retain a special master
3 forthwith. But the specifics of the protocol, we agree
4 there should be a written protocol, but that should be
5 discussed with the special master, because the special
6 master's going to actually have to implement it and it
7 should be achievable by the special master or special
8 masters.

9 And so, some of those more fine-grain details, I don't
10 -- I'm not sure -- I'm not sure we have disagreement by the
11 way, I just don't think we have final agreement. And we
12 have asked Epic to put forward the proposal in writing, so
13 that we can comment on it and eventually put it over to the
14 special master.

15 So, I don't want to be -- suggest that I'm agreed with
16 every word that Mr. Even said, but the overarching arc is
17 acceptable to us. And we think the -- there are no
18 significant disagreements that we've discussed in our two
19 meeting -- meet and confers that should preclude this from
20 happening, but we think a special master should be involved
21 in the details.

22 Regarding the appeal issue, we do plan to appeal the
23 Court's order. We can't produce documents at the same time.
24 I don't think the appeal will take that long to decide. If
25 -- by the way. But once it is resolved one way or the

1 other, we will apply the order. And if the review starts
2 before the appeal is resolved, we believe the two-piles
3 approach, if you will, we can review them both with and
4 without the order, and just put a flag or a note or
5 something on it.

6 We plan to provide an explanation of the privilege
7 maintains to the special master, so that that will be -- so
8 we can just include that information in there, and then
9 however the appeal is resolved, it should -- it wouldn't
10 take long because the review could go underway. So it
11 wouldn't be a delay issue at all.

12 As Mr. Even said, we're fine with Judge Laporte if
13 she's available. We did work with her before. As the Court
14 is aware, there are a number of former district and
15 magistrate judges with JAMS in California, and we thought to
16 start with her and see if either she's available or if she
17 has other ideas. And Mr. Even has proposed some others. We
18 have some others, too, but we thought the most -- make the
19 most sense to start with Judge Leporte, just given that she
20 had prior experience with the parties and this case.

21 THE COURT: All right. Well, thank you.

22 Epic has indicated a desire to have a stipulation and
23 proposed order presented to Judge Gonzalez Rogers by Tuesday
24 at 5:00 p.m. Does Apple also think that's a good time to
25 aim for?

1 MR. PERRY: Well, it wasn't quite clear what the
2 proposal was. I'm not sure we could have a protocol for the
3 re-review done by then, because I think -- as I said, I
4 think we need the special master involved in it. If we get
5 a special master retained on Saturday that may be
6 achievable. I just don't know how long it will take to get
7 a special master.

8 If it's simply a over -- a larger picture, the parties
9 agree to a re-review with the special master, absolutely we
10 could do that by Tuesday. So I wasn't quite clear what the
11 proposal was for [13:28:16].

12 THE COURT: I see. Well, let me turn to Epic.

13 Apple's suggestion that the details of the written
14 protocol should likely be discussed with the special master
15 or special masters, because they would also be participants
16 in that. That has some intuitive appeal to me. What do you
17 think?

18 MR. EVEN: So, I don't think there is a problem
19 with that approach as long as it doesn't cause too much
20 delay. So, I do think that we want a date certain by which
21 the parties are committed to find at least one special
22 master and work with them, and make sure that we're not
23 missing something that the special master, even their
24 experience in that space, will just tell us is we're doing
25 wrong. But we do -- we don't want to spend the next two

1 weeks and then bump up against the holy days with nothing
2 happening.

3 So, we do need something like that. I still think that
4 Tuesday should be fine. We have -- we proposed four names.
5 I've not heard Apple's names yet, but I'm sure that we will
6 consider quickly. And if we have between us six or seven or
7 eight names, I can't see a reason why we can't come to
8 ground relatively early next week on something that could be
9 presented.

10 THE COURT: But do you agree with Apple's proposal
11 that it be done in two stages. One is the stipulation and
12 proposed order before Judge Gonzalez Rogers that would
13 establish certain things, but then a more detailed written
14 protocol would be worked out with the special master, or do
15 you not think that structure is workable?

16 MR. EVEN: I think that structure should be
17 workable for us, assuming it moves things along in the most
18 efficient way. Yes.

19 THE COURT: Okay. Thank you. Then you flagged
20 some open items. They sounded like those are still
21 discussion points between the parties, is that correct?

22 MR. EVEN: I think that right. Mainly -- and
23 maybe it's a discussion point, maybe it's a question to your
24 Honor, which is, mainly what to do given Apple's stated
25 intent to appeal and how to deal with that. We don't think

1 this should be stayed. It sounds like Apple doesn't think
2 it should be completely stayed. I'm not sure I fully
3 understood the notes system that was proposed, but we do
4 need some guidance on that.

5 THE COURT: I think you had suggested two
6 alternatives. One is that Apple could conduct this process
7 on the assumption that my order valid, but then claw back
8 documents in the event that some or all of my order is
9 reversed.

10 And alternatively for Apple, any documents that would
11 have to be produced under my order, but that they're
12 challenging that part of the order on appeal, they could
13 just mark those as a separate category and not produce them
14 until the appeal is resolved.

15 Let me turn to Apple. Were you thinking one of those
16 two options?

17 MR. PERRY: Yes, your Honor. The first option
18 doesn't work for Apple, but the second option's what I
19 referred as two-piles category. If it's a document on re-
20 review that is not affected by the order, then it would just
21 be re-reviewed and either downgraded or maintained in the
22 ordinary course.

23 If it's a document that is affected by the order, it
24 would simply be -- it would be re-reviewed both ways, with
25 the order and without, a cover sheet put on it, put in a

1 pile to hold. Once the appeal's resolved, the fork in the
2 road is decided, it goes one way or the other and then it
3 gets either produced or maintained.

4 So, it wouldn't delay the re-review, it would simply be
5 the timing of the production, and we can keep track of those
6 as we go along.

7 THE COURT: Apple's proposal seems reasonable to
8 me. It avoids Apple having to produce what might be a large
9 number of documents over which it has a pending claim of
10 privilege that has not been fully adjudicated. So --

11 MR. EVEN: Understood, your Honor. That's
12 acceptable to us.

13 THE COURT: All right. I don't have any
14 recommendations for potential special masters. I'm sure the
15 two sides can do your research and come up with people that
16 you believe are appropriate.

17 Is there anything else that Epic wanted to talk about
18 at this hearing? Because what I would like to do is direct
19 the parties to meet and confer and get a stipulation and
20 proposed order on file before Judge Gonzalez Rogers by
21 Tuesday at 5:00 p.m. And then that -- then you would --
22 once you get the special masters in place, then you could
23 work out the details of the protocol with them. But before
24 I send you off to meet and confer, is there anything else
25 Epic wanted to discuss at this hearing?

1 MR. EVEN: Not for Epic, no, your Honor. Thank
2 you.

3 THE COURT: Is there anything else that Apple
4 would like to discuss at this hearing?

5 MR. PERRY: Your Honor, if it's okay, I have a
6 question for the Court, since I've not been in this exact
7 situation before.

8 On the stipulation and proposed order, my conception as
9 -- as sitting here would be a couple of paragraphs
10 explaining the parties' dispute, the broad outlines of the
11 agreement, and the request for a special master to resolve
12 that piece of the case. Is that what the Court has in mind,
13 or are -- in other words, should we be doing more than that
14 or could it be relatively straightforward I guess is the
15 real question. How much detail and so forth --

16 THE COURT: Well --

17 MR. PERRY: -- do you think Judge Gonzalez Rogers
18 would expect?

19 THE COURT: Ultimately, this is up to Judge
20 Gonzalez Rogers because she was the one who would review the
21 stipulation and proposed order and determine if it's
22 satisfactory. But what you were describing sounds like a
23 reasonable approach to me. That you would describe the
24 nature of the discovery dispute the parties have and the
25 scope and the extent of it, and then describe the proposed

1 way to resolve it. So that Judge Gonzalez Rogers can read
2 the parties' stipulation and proposed order, and it will
3 explain what the parties are doing and why.

4 MR. PERRY: I appreciate that guidance, your
5 Honor. Thank you.

6 THE COURT: And was there anything else from Apple
7 today?

8 MR. PERRY: Nothing else, your Honor.

9 THE COURT: Let me ask the parties, should I set
10 another hearing in the future as a kind of control date, so
11 I can check in with the parties on how things are going?
12 Does Epic think that's a good idea?

13 MR. EVEN: So, yes, especially if we're leaving
14 some things that ought to be resolved as to a protocol, then
15 I think that would be helpful to the parties.

16 I also wanted to raise one more thing, which is, given
17 that we have -- we seem to have agreement on at least the
18 framework for this, we actually are -- I believe need to
19 file something with Judge Gonzalez Rogers on Monday, if I'm
20 not mistaken, and Mr. Perry will correct me if I'm wrong, a
21 status report.

22 MR. PERRY: Yeah. We have a case management
23 conference statement due on Monday.

24 MR. EVEN: And so maybe the most efficient way is
25 to -- since we are doing the framework along the plan that I

1 read out but not with too many details, maybe the most
2 efficient way is to just include this as part of that -- as
3 part of that filing, instead of putting two separate papers
4 that I'm sure will speak to the same thing, because one
5 affects the other.

6 This is a status report, your Honor, that Judge
7 Gonzalez Rogers had asked us to file in order to let her
8 know whether we think we are in a position to be fully
9 prepared to resume hearings on the 13th of January.

10 THE COURT: I see. Well, I will leave it to the
11 parties' judgment about whether you want to file one thing
12 or two things before Judge Gonzalez Rogers.

13 MR. EVEN: Okay.

14 THE COURT: When do you recommend that we have the
15 next hearing, so I can check in with the parties?

16 MR. EVEN: I think a week from today would be --
17 would be good, your Honor.

18 THE COURT: Does Apple agree with that?

19 MR. PERRY: Your Honor, we have a case management
20 conference with Judge Gonzalez Rogers on the 16th. We have
21 a joint status report due to your Honor a week from today on
22 the 12th, and they make -- this may all get sorted by the
23 16th. In other words, we have a hearing already set with
24 Judge Gonzalez Rogers on the 16th.

25 We are happy to appear before you of course at any time

1 if you'd like to hear it before then. I just wanted you to
2 know that there is a conference on Judge Gonzalez Rogers'
3 calendar for the 16th in the afternoon.

4 THE COURT: Well, thank you for that. Taking that
5 into account, when does Apple recommend that we have another
6 hearing?

7 MR. PERRY: Your Honor, our proposal would be then
8 the 17th or 18th, because then we could report to the Court
9 the outcome of whether -- you know, any results or feedback
10 we have from Judge Gonzalez Rogers about these issues and
11 the path forward.

12 THE COURT: Does that work for Epic?

13 MR. EVEN: I think Epic would still prefer to see
14 your Honor in one week, to make sure that we get whatever
15 details, additional details need to be sorted out with a
16 special master protocol ahead of the hearing with Judge
17 Gonzalez Rogers, so that we'll be -- when we are before her,
18 we can report that the protocol is fully in place and the
19 process is running. And hopefully we have an estimate of
20 when the process will be done, and can discuss with her
21 whether January 13 is the right date to start or not.

22 THE COURT: I see. How about Friday, December
23 13th? The parties have a status report -- is it correct the
24 parties have a status report due to me on the 12th?

25 MR. EVEN: I --

1 MR. PERRY: That's what my notes say, your Honor.

2 MR. EVEN: That is the Friday the 13th, then, yes,
3 it's on the 12th.

4 THE COURT: Then let's schedule it for the 13th,
5 because then I can have the benefit of having read your
6 status report that's filed on the 12th. Does 1:00 p.m.
7 Pacific time work for the parties?

8 MR. PERRY: Yes, your Honor.

9 MR. EVEN: I believe it does, your Honor.

10 THE COURT: Do you need to check your calendar
11 further?

12 MR. EVEN: Confirmed. Yes, it does.

13 THE COURT: Okay. Well then thank you. Then I
14 will schedule a further hearing for Friday, December 13th at
15 1:00 p.m.

16 MR. EVEN: Thank you very much, your Honor.

17 UNIDENTIFIED SPEAKER: Judge, can you hear me now?

18 THE COURT: I can hear you.

19 UNIDENTIFIED SPEAKER: Yes. Good.

20 THE COURT: Okay. Anything further from Epic
21 before we end this hearing?

22 MR. EVEN: No, thank you, your Honor.

23 THE COURT: Anything further from Apple?

24 MR. PERRY: Not at this time, your Honor. Thank
25 you for your attention.

1 THE COURT: All right. Thank you, counsel. The
2 matter is submitted. We'll be back on December 13th at 1:00
3 p.m.

4 MR. EVEN: Thank you.

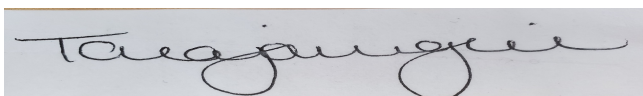
5 UNIDENTIFIED SPEAKER: Thank you.

6 (Proceedings adjourned at 1:39 p.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A rectangular box containing a handwritten signature in cursive script, which appears to read "Tara Jungi".

Echo Reporting, Inc., Transcriber

Saturday, December 7, 2024